IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 838 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

BHARVAD BHAGABHAI POPATBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 838 of 1991

MR MC BAROT for Petitioner No. 1

MR HH PATEL A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 08/03/2002

ORAL JUDGEMENT

1. The appellant has approached this Court under Section 374 (2) of the Code of Criminal Procedure, (for short `Cr.P.C.') challenging the judgment and order of conviction and sentence passed against him by learned Additional Sessions Judge, Surendranagar on 13th November, 1991 in Sessions Case No.32/1989. Vide the said judgment, the appellant has been convicted for the offence under Section 323 of the Indian Penal Code. He

has been sentenced to suffer R.I. for a period of six months and to pay fine of Rs.500/-, in default S.I. for one month. He is further convicted by the learned Trial Court for the offence under Section 333 of the Indian Penal Code and he has been sentenced to suffer R.I. for five years and to pay fine of Rs.2,500/- in default S.I. for a period of three months. Both the sentences are ordered to run concurrently.

2. The case of the prosecution in nutshell can be stated as under :-

2.1. On 26th July, 1988, complainant Asrafbhai Sulemanbhai alongwith Jethabhai Pamabhai and Nanjibhai Dalabhai were discharging duty as home guards. Their duty was to keep vigil in the area known as Rampura Darwaja, in Sayla. During their patrolling near khadibhandar they heard a woman crying. All the three therefore went to the house from where they heard the voice of crying. The complainant Asrafbhai gave a shout inquiring as to what was happening inside the house. At that time the appellant opened the door and came out. He was enraged and he immediately asked the home guards what they wanted to know from him. The appellant at that time was carrying a stick with him. The appellant told the home guards that it was his personal matter and they should not interfere in the same and saying so he gave two to three slaps to Asrafbhai the complainant, and one blow with stick on the head of Nanjibhai. The complainant immediately blew whistle to summon help. On hearing the whistle the other colleagues of the complainant came there rushing. On seeing the condition of Nanjibhai he was immediately removed to hospital of one Odhubhai and from there he was taken to Sayla hospital. After giving primary treatment the medical officer at Sayla hospital advised the patient to be taken to Surendranagar hospital, since the patient had sustained fracture on the head. P.S.I. Ratansinh Chandrasinh Waghela was discharging duty as 2nd P.S.I. at Sayla police station at the relevant time. He was at his home when he received message from the police station that one home guard named Nanjibhai Dalabhai had received injury on the head and he had been removed to Government hospital at Surendranagar in Government vehicle. He therefore went to the hospital and recorded complaint of Asrafbhai Sulemanbhai and forwarded it to the police station for registering offence under Section 307 Indian Penal Code at the police station. Upon receipt of the complaint offence was registered against the appellant under Sections 323 and 333 of the Indian Penal Code. P.S.I. Ratnasinh thereafter proceeded with the

investigation of the case, during which he arrested the appellant, seized the stick used in commission of the offence, drew panchnamas, recorded statements of various persons and at the end of the investigation he submitted chargesheet in the Court of concerned learned Judicial Magistrate, who in turn committed the case in the Court of Sessions as offence under Section 307 I.P.C. is exclusively triable by the Court of Sessions.

3. At the trial the learned Assistant Sessions Judge, Surendranagar framed charge against the appellant on 29th July, 1991 at Exh.15. The charge was framed for offences punishable under Section 307 of the Indian Penal Code and Section 135 of the Bombay Police Act. The charge was read over to the appellant who denied the same and claimed to be tried.

3.1. During the trial the prosecution examined seven witnesses and also relied on some documentary evidence in support of its case. On conclusion of the recording of the evidence, the appellant under Section 313 of the Cr.P.C. has put all the incriminating circumstances appearing against him in the evidence, with a view to enable him to render explanation if he so desired. It appears that he has not pleaded any specific case but his defence is that of general denial.

4. At the end of the trial, the learned Judge came to the conclusion that the prosecution had proved beyond reasonable doubt that in the early morning of 26th July, 1988 the appellant had caused injury to Nanjibhai with iron shod stick and he had also given two slaps to the complainant. The learned Judge has further held that the prosecution had proved beyond reasonable doubt that at the time of assault the appellant very well knew that Nanjibhai Dalabhai and the complainant were home guards. He therefore, held that the appellant was liable for committing offence punishable under Sections 333 and 323 of the Indian Penal Code. The learned Judge, however, held that the prosecution had not been able to prove the offences under Section 307 of I.P.C. and Section 135 of the Bombay Police Act against the appellant. In the result, the learned Judge passed sentence which has been already described above.

5. At the hearing of this appeal, Mr.M.C. Barot learned counsel appearing for the appellant has submitted that the Trial Court has committed error in convicting the appellant for offences under Sections 333 and 323 of the Indian Penal Code. According to him the prosecution in the instant case has not been able to prove guilt of

the appellant beyond reasonable doubt. He has further submitted that the complainant Asrafbhai Sulemanbhai as well as injured Nanjibhai Dalabhai have not supported the case of the prosecution. So far the evidence of Jethabhai Pamabhai is concerned, it does not inspire confidence and it is highly doubtful whether he would have at all seen the incident. It is therefore submitted by Mr.Barot that there is practically no evidence on record to show that it was the appellant who had committed this crime. Lastly, he has submitted that this appeal deserves to be allowed and the appellant is required to be acquitted.

5.1. As against that Mr.H.H. Patel, learned A.P.P. appearing for the respondent State has submitted that the judgment and orders of conviction and sentence passed by the Trial Court are just and proper, and there is no need to interfere with the same. According to Mr.Patel, there is clear evidence of the eye witnesses on record to show that it was the appellant who had caused injuries to Nanjibhai Dalabhai and Asrafbhai Sulemanbhai and for that he has been rightly convicted by the Trial Court for committing offences under Section 333 and Section 323 of the Indian Penal Code. He has further submitted that the appeal does not have any merit and it deserved to be dismissed.

5.2. The counsels have taken me through the record of the case and I have also perused the evidence to reappreciate it.

6. With a view to establish that Nanjibhai Dalabhai had received injury on the head, the prosecution has examined Dr.Ghanshyam Chaturbhai P.W.2 Exh.7. At the relevant time he was working as medical officer in the hospital at Surendranagar. He has stated in his evidence that on 26th July, 1988 at about 5.00 a.m. complainant Asrafbhai Sulemanbhai as well as Nanjibhai Dalabhai were brought to the hospital for treatment alongwith police yadi. On examining Nanjibhai Dalabhai, he had noticed one injury i.e. C.L.W. on the right frontal region of the size of 4 c.m. x 2 c.m. deep to bone. On palpation he suspected fracture of the Right frontal bone. He has stated that such injury could be caused by hard and blunt substance. He has further stated that in the evening of 26th July, 1988, he had also examined the appellant as he had sustained one injury on the left ear on the post surface on middle part of the size 1 c.m. x 1 c.m. and blood had got coagulated on that part. He has produced certificates with regard to the injury sustained by Nanjibhai as well as appellant at Exh.9 and 12

respectively. This witness on the same day had examined complainant Asrafbhai who had not suffered any external injury. He had complained pain in teeth. In the opinion of this witness such pain could be as a result of assault with hard and blunt substance. In the cross-examination, this witness has agreed to the suggestion made by the defence that Nanjibhai's injury could also be caused on account of stone throwing or due to falling on hard surface. Looking to the medical certificates produced on record as well as the oral testimony of this witness, it is very clear that on 26th July, 1988, Nanjibhai Dalabhai had sustained injury with hard and blunt substance on his head and complainant Asrafbhai Sulemanbhai had sustained injury on teeth. It is therefore safe to conclude that both these witnesses had received injuries in the incident which took place on that day.

6.1. The question now remains to be decided is whether it was the appellant who had caused these injuries to Nanjibhai Dalabhai and Asrafbhai Sulemanbhai.

6.2. With a view to establish this fact, the prosecution has examined three eye witnesses namely; (1) Asrafbhai Sulemanbhai P.W.1 Exh.5, (2) Nanjibhai Dalabhai P.W.3 Exh.13 and (3) Jethabhai Pamabhai P.W.4 Exh.14. Asrafbhai Sulemanbhai is the complainant in this case. He has stated that alongwith him, Nanjibhai Dalabhai and Jethabhai Pamabhai were discharging duty as home guard in the early morning of 26th July, 1988 in area called Rampura Darwaja. While they were on duty they heard a woman crying and, therefore all the three went there with a view to inquire as to what was happening there. This witness gave a shout inquiring who was crying inside the house. At that time many people had gathered there and on account of darkness the witness had switched on his torch. In response to the shout given by the witness, one person came out of the house. He was carrying stick with him. According to Asrafbhai Sulemanbhai he knew the person by face but he came to know about his name later on. He has further submitted that the person came out and told them (homeguards) that it was his internal dispute and they should not interfere in the matter. He was very much agitated at that time. The witness has further stated that he gave two slaps to him, but he was not sure that it was the very same person who had given him slaps or someone else from the crowd had slapped him. He has further stated that Nanjibhai Dalabhai had received stick blow on his head, but he did not know who gave that stick blow to Nanjibhai Dalabhai. This witness was therefore declared hostile by the learned A.P.P. and with the permission of the Court he cross-examined the

witness. In the cross-examination by the learned A.P.P. this witness has stated that he had stated in the complaint that the appellant had given him two slaps on the chick. He has further stated that Bhagabhai Popat i.e. the appellant had given stick blow to home guard Nanjibhai Dalabhai. In the cross-examination by the defence this witness has stated that it was dark at the

time of the incident and when he gave shout many people belonging to Bharwad community had come out. According to this witness he was unable to identify those persons. In the cross-examination he has further stated that it was his presumption that the person who came out from the house gave him two slaps, but he was not sure about it. He has also stated that he was not sure who gave stick blow to Nanjibhai Dalabhai.

6.3. Considering the fact that this witness has not at all supported the prosecution, his evidence is totally useless for the prosecution to prove its case against the appellant and no reliance can be placed on the evidence of this witness to base conviction of the appellant.

6.4. Nanjibhai Dalabhai P.W.3 Exh.13 is the person who had received injury on head in this incident. In the examination-in-chief, he has stated that while they were on duty they heard one woman crying and they went to the place to make inquiry. One person came out from the house. He did not know who that person was. As soon as that person came out he and the complainant started grappling with each other. According to this witness he was just watching the grappling between the two. He has further stated that after about 15-20 seconds somebody gave him stick blow on the head, as a result of which he fell down. This witness has also been declared hostile and cross-examined by the learned A.P.P. with the permission of the Court. In the cross-examination by the learned A.P.P., though he has stated that police had recorded his statement he has denied that the police had interrogated him about the incident. He has further stated that he had not stated before the police that the person who assaulted him with stick was Bharwad of Sayla named Bhojabhai Popatbhai. In cross-examination by the defence this witness has stated that at the time when the incident took place it was very dark. He has further stated that many persons of Bharwad community had gathered there and he had no idea who had caused him injuries. He has also stated in his cross-examination that Jethabhai Pamabhai and Dashrathbhai came to the place of incident only after the complainant Asrafbhai Sulemanbhai blew the whistle.

6.5. Like the complainant this witness has also not supported the prosecution and his evidence cannot be relied on for convicting the appellant.

6.6. Jethabhai Pamabhai P.W.4 Exh.14 is the third eye witness who has stated in his examination-in-chief that on hearing a woman crying they went to the place of incident where the complainant Asrafbhai Sulemanbhai, Nanjibhai Dalabhai were assaulted by the appellant with slaps and sticks respectively. In the cross-examination this witness has stated that it was very dark at the place of incident and many people had gathered there. He has further admitted that because of the darkness, he could not see people standing there.

6.7. Considering the evidence of this witness, it appears that though he has supported the prosecution case, his evidence is not free from doubt. This is because according to the evidence of Nanjibhai Dalabhai, the injured himself, Jethabhai Pamabhai came to the scene of offence only after the incident was over. Nanjibhai Dalabhai has very clearly stated that it was only when Asrafbhai Sulemanbhai blew whistle after receiving injury, Jethabhai and Dashrathbhai came to the spot. It is therefore, a matter of grave doubt whether Jethabhai was really present when the actual incident happened. Even assuming that he was present at the time of offence, according to the eye witnesses at the time of incident it was very dark. Jethabhai has even gone to the extent of saying that though many people had collected there, he could not see them on account of darkness. It is therefore very much doubtful whether this witness could have seen the appellant causing injury to Asrafbhai Sulemanbhai as well as Nanjibhai Dalabhai. It is also his evidence that the locality is inhabited persons belonging to the Bharwad community and at the time when the incident took place many persons belonging to that community had gathered there. The appellant also belongs to that community. It is a matter of common knowledge that because of the peculiar dress they put on even otherwise also it becomes difficult to distinguish one from the other. Moreover because of the pitch darkness at the place of incident also, the error on the part of Jethabhai in identifying the appellant cannot be ruled out, since the injured witnesses themselves were unable to identify their assailant. In view of these circumstances, it is difficult to believe that this witness namely Jethabhai Pamabhai could have identified the appellant as the assailant of Asrafbhai Sulemanbhai and Nanjibhai Dalabhai. In view thereof it is not

possible for me to accept the evidence of this eye witness.

7. Except these three eye witnesses no other witness has been examined by the prosecution to narrate what had actually happened in the early morning of 26th July, 1988. Since there is no reliable evidence with regard to the author of the crime, in my opinion the conclusion reached by the Trial Court fixing the guilt on the appellant is erroneous and it is required to be set aside.

8. In the result, this appeal is allowed. The orders of conviction and sentence passed by the learned Trial Court for offences under Sections 333 as well as 323 of the Indian Penal Code are quashed and set-aside. Since the appellant is on bail, his bail bonds are ordered to be cancelled. Fine if paid, be refunded to the appellant. Mudammal to be disposed of in accordance with the directions of the Trial Court.

(Akshay H. Mehta, J.)

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